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JOHN F. DAVIS, CL

In The
Supreme Court of the United States

OCTOBER TERM, 1969

No. 922

MAKAH INDIAN TRIBE, as a tribe and as a Federal corporation, on its own behalf and on behalf of each of its members,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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Appellant,

v.

STATE OF WASHINGTON,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

This case involves the constitutionality of Washington State statutes which, as applied, would create a state property interest in trust land on an Indian reservation without compensation to the Indians, and which would severely restrict the federally protected tribal right to exclude non-Indians from the reservation. Specifically, the question involves whether Chapter 240, Laws of 1957, and Chapter 36, Laws of 1963 (now codified as Revised Code of Washington, Chap-

ter 37.12),[1] as applied, violate the Constitution of the United States, the Makah Treaty (12 Stat. 939) and federal statutes.

As applied by the Opinion of the Washington Supreme Court, RCW Ch. 37.12 would create state public highways on trust land on the Makah Indian Reservation, Washington, and thus encumber the land without compensation to the Indian landowners. Since state public highways are open to the public "as a matter of right," the state statute would severely restrict the Makah Indian Tribe's sovereign authority to exclude non-Indians from the Reservation.

Appellant, the Makah Indian Tribe, appeals to the Supreme Court of the United States from the judgment of the Washington Supreme Court issued September 9, 1969.[2] The Makah Indian Tribe submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 76 W.D.2d 645 (1969), and is reprinted as Appendix A. The superior court's decision is not reported but is reprinted as Appendix B. The

[1] Appendix D, p. D-9
[2] Appendix C

judgment appealed from (being the Remittitur) is reprinted as Appendix C.

JURISDICTION

On January 17, 1966, the Makah Indian Tribe filed a complaint in the Superior Court of the State of Washington for Thurston County, seeking a declaratory judgment, pursuant to RCW, ch. 7.24 (the Uniform Declaratory Judgments Act), that RCW, ch. 37.12 is invalid as repugnant to Article I, section 8, clause 2 of the United States Constitution, the Fourteenth Amendment of the United States Constitution, section 1, clause 2, the Makah Treaty, 12 Stat. 939, 18 U.S.C. §1162, 28 U.S.C. §1360, and 25 U.S.C. §§177, 311, 476 et seq., and that tribally and federally built roads on trust land on the Makah Indian Reservation are not state public highways. The action resulted from several arrests by the State of Washington of enrolled members of the Makah Indian Tribe for alleged violations of state traffic laws committed on the main street of the Village of Neah Bay on the Makah Indian Reservation.

On August 9, 1966, the matter was tried in the Superior Court and on November 15, 1966, Honorable Hewitt A. Henry rendered a Memorandum Opinion[4]

[3] R. 2
[4] Appendix B

adverse to the Makah Indian Tribe.

On December 2, 1966, judgment[5] was entered adjudging that RCW Ch. 37.12 is constitutional and in specific compliance with Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360), and that roads on the Makah Indian Reservation constructed or improved and maintained by the Bureau of Indian Affairs are public highways under the laws of the State of Washington.

On December 10, 1966, the Makah Indian Tribe filed a timely Notice of Appeal.[6]

On August 7, 1969, the Washington Supreme Court affirmed the Superior Court and rendered a written opinion.[7]

On September 9, 1969, the Washington Supreme Court issued its Remittitur[8] to the Superior Court which is the judgment enforcing the written opinion of the Washington Supreme Court entered August 7, 1969.[9]

On September 18, 1969, the Makah Indian Tribe filed, in the Washington Supreme Court, a Notice of

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[5] R. 21
[6] R. 31
[7] Appendix A
[8] Appendix C
[9] RCW 2.04.170, Rules Peculiar to the Business of the Supreme Court, Rule 15.
[10] R. 147

Appeal[10] from the Remittur to the Supreme Court of the United States.

The jurisdiction of the Supreme Court to review this Judgment by appeal is conferred by 28 U.S.C. §1257(2) which reads in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Warren Trading Post Company v. Arizona Tax Commission,* 380 U.S. 685, 686 (1965); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288, 289 (1921).

CONSTITUTIONAL AND TREATY PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, article I, section 8, clause 2.[11]

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[10] Appendix D, p. D-1.

United States Constitution, 14th Amendment, section 1, clause 2.[12]

The Makah Treaty, 12 Stat. 939, Article II.[13]

Public Law 83-280 (67 Stat. 588, 18 U.S.C. § 1162; 28 U.S.C. §1360).[14]

25 U.S.C. 177.[15]

25 U.S.C. 311.[16]

25 U.S.C. 476.[17]

Revised Code of Washington, Chapter 37.12.[18]

25 C.F.R. §162.6.[19]

QUESTIONS PRESENTED

The basic questions presented are whether RCW, Ch. 37.12, as applied, is invalid because it

1. Would create state public highways on the Makah Indian Reservation,

2. Would grant the general public a vested right of entry into the Makah Indian Reservation,

3. Would take private Indian trust land for a public purpose without compensation to the Indian landowners,

4. Would severely restrict the sovereign authority

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[2] Appendix C
[12] Appendix, D, p. D-1
[13] Appendix D, p. D-1
[14] Appendix D, p. D-2
[15] Appendix D, p. D-6
[16] Appendix D, p. D-7
[17] Appendix D, p. D-8
[18] Appendix D, p. D-9
[19] Appendix D, p. D-13

of the Makah Indian Tribe to exclude non-Indians from the Makah Indian Reservation, and

5. Would interfere with plenary federal authority over the Makah Indian Tribe,

all in violation of the Indian Commerce clause of the United States Constitution, the Due Process clause of the 14th Amendment of the United States Constitution, the Makah Treaty, the Makah Constitution and Bylaws, and federal satutes and regulations.

STATEMENT OF THE CASE

1. *Establishment of Reservation and Right of Exclusion*

The Makah Indian Tribe entered into a treaty[20] with the United States at Neah Bay on January 31, 1855, ceding most of its territory on the northwest corner of the Olympic Peninsula in the Territory of Washington to the United States, reserving a smaller portion as the Makah Indian Reservation at Neah Bay. The Reservation has since been expanded by executive orders[21] of the President of the United States. At the time it was established and at present, fee title to the Reservation was and continues to be held in trust for the Makah Indian Tribe and its members by the United States.

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[20] Treaty of January 31, 1855, 12 Stat. 939.

[21] October 26, 1872, I. Kapp. 917; January 2, 1873, I Kapp. 918; October 21, 1873, I Kapp. 918

In 1936, the Makah Indian Tribe was organized under the Indian Reorganization Act,[22] and has continued to exist both as a tribe and as a federal corporation.

As was usual with most Indian treaties, the Makah Treaty guaranteed to the Tribe the right to exclude non-Indians from the Reservation. Article II of the Makah Treaty provided in part:[23]

> ". . . nor shall any white man be permitted to reside upon the same without permission of the said tribe. . . ."

This inherent sovereign right of the Makah Indian Tribe to exclude non-Indians from the Reservation was incorporated in the Constitution and Bylaws of the Makah Indian Tribe of the Makah Indian Reservation, Washington.[24] The Tribal Constitution empowers the five-member Makah Tribal Council in Article VI, Section 1, in part as follows:

> "(g) . . . to exclude from the territory of the tribe persons not legally entitled to reside thereon, or trespassers upon the reservation. . . ."

2. *Development of Reservation Road System*

At the time of signing the Makah Treaty in 1855, what is now the Makah Indian Reservation was a remote, isolated area, difficult of access by land but

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[22] 48 Stat. 984, 25 U.S.C. §461, et seq.
[23] Appendix D, p. D-1.
[24] R. Exhibit 2

easily accessible by water. With the advent of the twentieth century and the automobile, however, it was inevitable that roads be constructed to and inside the Reservation. The Bureau of Indian Affairs platted the Village of Neah Bay and laid out its road system in 1917.

a. Federal Roads

In 1928 and 1929, the road into the Reservation was constructed and graveled, in part by the Bureau of Indian Affairs, and in part by the Makah Indian Tribe, from the east boundary of the Reservation to the Village of Neah Bay. As seen from Exhibit 4,[25] it overlies 14 separate trust allotments and much tribally owned land on its course. Since 1930, numerous roads have been constructed on the Reservation, some by the Tribe, some by the Bureau of Indian Affairs, and some as joint projects.

In 1938, a detailed body of federal regulations governing construction of federal roads on Indian reservations was promulgated by the Secretary of the Interior, requiring prior to the undertaking of road work, that rights-of-way be obtained by consent of the Tribal Council and individual allottees of underlying lands. In 1957, 25 C.F.R., part 162, entitled "Roads of the Bureau of Indian Affairs," was promulgated, sup-

[25] R. Exhibit 4

planting the earlier sections, and providing in part, in Section 162.6, that:

> "Roads subject to the regulations in this part shall be open for free public use."[26]

Six years *earlier,* in 1951, pursuant to 25 C.F.R., part 162, the Bureau of Indian Affairs designated a system of roads on the Reservation comprising approximately 40 miles as the Indian Service Road System of the Makah Reservation. The System includes the road into the Reservation and the main street of the Village of Neah Bay. Although the naming of the System appears designed to change the roads included into roads of the Bureau of Indian Affairs, subject to 25 C.F.R., part 162, the federal government did not obtain consents from the Tribe or individual allottees and rights-of-way for construction for even ten per cent of the roads included in the System, as required by those very regulations.[27]

b. State Roads

In 1957, 25 C.F.R., part 161, entitled "Rights-Of-Way Over Indian Lands," was promulgated by the Secretary of the Interior, to provide for state public highways on Indian reservations. However, since the Reservation is at the northwest tip of the Olympic Peninsula, the road into the Reservation permits ac-

[26] Appendix D, p. D-13
[27] R. 70, 11. 8-30

cess to the Reservation only and is not necessary for access ~~to any other~~ part of the State. Accordingly, the State of Washington has never established a state public highway on the Makah Indian Reservation, and the Bureau of Indian Affairs has never transferred a road on the Reservation to the State of Washington.[29]

In 1963, pursuant to Public Law 83 280, the Legislature of the State of Washington assumed partial criminal and civil jurisdiction over Makah Indians and the Makah Indian Reservation.[30] RCW, ch. 37.12, provides in part that the State of Washington assumed jurisdiction of Indians on Indian reservations in the "Operation of motor vehicles upon the public streets, alleys, roads and highways. . . ."[31]

On February 15, 1964, a deputy sheriff for Clallam County, Washington, arrested Eugene Mahone, an enrolled Makah Indian, in Neah Bay for operation of an automobile on the main street of the Village of Neah Bay without a current Washington state operator's permit in his possession, allegedly in violation of RCW 46.20.020. Eugene Mahone was tried and convicted in justice court, and while his case was on

[28] R. 51, 1.29, R. 52, 11. 1-4, and R. 71, 11. 15-18
[29] R. 48, 11. 21-22, R. 50, 11. 7-11 and 11. 21-30, R. 78, 11. 1-20, R. 88, 11. 9-30, R. 82, 11. 1-25, and R. Exhibits 4, 6 and 10
[30] RCW, Ch. 37.12, Appendix D, p. D-2
[31] RCW 37.12.010
[32] R. 4, 11. 7-15, R. 9

appeal to the Superior Court for Clallam County, he died and the appeal was dismissed.[32]

A second, similar incident occurred on January 25, 1965, when Douglas Coleman, another enrolled Makah Indian, was arrested in Neah Bay upon the same charge.[33] As the result of these and other state infrusions upon the Makah Indian Reservation, the Makah Tribal Council filed a complaint on January 17, 1966, in the Superior Court of the State of Washington for Thurston County, seeking a declaratory judgment that the State of Washington has no authority to enforce state traffic laws against members of the Makah Indian Tribe for alleged offenses committed on the Reservation, and that tribally and federally built roads on trust land of the Reservation are not public highways of the State of Washington. Upon trial of the matter, the Superior Court for Thurston County held against the Makah Indian Tribe in all respects.

The Makah Indian Tribe appealed to the Washington Supreme Court, which affirmed the opinion of the Superior Court.

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[33] R. 4, 11, 17-32, R. 9

HOW THE FEDERAL QUESTION WAS PRESENTED

The Makah Indian Tribe's Complaint:

The Makah Indian Tribe's Complaint alleged that Chapter 240, Laws of 1957, and Chapter 36, Laws of 1963 (now codified as Revised Code of Washington, Chapter 37.12):

> "... are invalid since they violate 25 Stat. 676 (the Enabling Act admitting the State of Washington into the Union) and 67 Stat. 588 (Public Law 83-280), and are unconstitutional since they violate Article XXVI, Second Section, of the Constitution of the State of Washington and the due process clause of the Fifth Amendment of the Constitution of the United States."[34]

and prayed:

> "... for a declaratory judgment that no public street, alley, road or highway of the State of Washington exists on the Makah Indian Reservation, Washington, that defendant has no authority to enforce state criminal or civil laws against members of the Makah Indian Tribe on the Makah Indian Reservation, Washington, that Chapter 240, Laws of 1957 and Chapter 36, Laws of 1963 (now codified as RCW 37.12.010 et seq.) are invalid and unconstitutional. . . ."[35]

Memorandum Opinion of the Superior Court of Washington:

The Superior Court granted judgment in favor of the State of Washington, upholding the validity of

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[34] R. 5, 11. 4-12
[35] R. 5, 11. 21-29

RCW, ch. 37.12. In its Memorandum Opinion, the trial court cited with approval an Opinion of the Attorney General of the State of Washington, AGO 63-64 No. 25, concluding that "public highways" of the State of Washington can be predicated upon "a public use" without the necessity of actual title in the public.[36]

Judgment of the Superior Court of Washington:

In its Conclusion of Law IV[37] the Superior Court concluded that the main street of the Village of Neah Bay is a state public highway *both* by the laws of the State of Washington and 25 C.F.R. §162.6 The Superior Court further held in Conclusion of Law VII[38] that all roads of the Indian Service Road System of the Makah Indian Reservation which are "open to the use of the public" are state public highways under RCW Chapter 37.12. Finally, in Conclusion of Law VIII[39] the Superior Court held that RCW ch. 37.12 is a constitutional enactment, giving the State of Washington jurisdiction over state public highways on the Reservation.

In the Judgment, the Superior Court held as follows:[40]

"ORDERED, ADJUDGED AND DECREED that Chapter 37.12 RCW as enacted in 1957 and as amended

[36] R. 13
[37] R. 19
[38] R. 20
[39] R. 20
[40] R. 21, 22

in 1963, is a constitutional and valid enactment of the legislature of the State of Washington enacted pursuant to and in compliance with Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360); and it is further

"ORDERED, ADJUDGED AND DECREED that the streets, roads, alleys and highways on the Makah Indian Reservation constructed or improved and maintained by the Bureau of Indian Affairs with public funds, and in particular, that portion of the Indian Service Road System known as Primary Road No. 1 (P-1) are public streets, roads, alleys and highways under the laws of the State of Washington; and it is further

"ORDERED, ADJUDGED AND DECREED that the State of Washington has jurisdiction over enrolled members of the Makah Indian Tribe on the public streets, roads, alleys and highways on the Makah Reservation, and the courts of the State of Washington have jurisdiction to enforce state laws on the public streets, roads, alleys and highways on the Makah Indian Reservation."

The Makah Indian Tribe's Brief to the Washington Supreme Court:

On appeal to the Washington Supreme Court, the Makah Indian Tribe, through assignments of error and argument, renewed its position that RCW, ch. 37.12, as applied, would create state public highways on the Makah Indian Reservation without compliance with federal statutes therefor, and that since state public highways are open to the public "as a matter of right," private Indian trust land would be taken for a public purpose without compensation to the In-

dian landowners. The Makah Indian Tribe also renewed its position that the granting to the public of a vested right of entry into the Makah Indian Reservation would severely restrict the sovereign authority of the Tribe to exclude non-Indians from the Reservation in direct violation of the Indian Commerce clause of the Federal Constitution, the Makah Treaty, federal statutes and the Makah Constitution and By-laws."[41]

In the discussion under Proposition of Law Number 2 in the Makah Indian Tribe's brief, it was stated:

> "Neither the 1957 regulations, the Bureau of Indian Affairs road designation, nor the holding of the trial court can legally transmute the existing roads on the Makah Indian Reservation into roads of the Bureau of Indian Affairs, and, a fortiori, into public highways under Washington State law. To uphold either would be to uphold a confiscation of Indian trust land without compensation in violation of the 5th Amendment of the Constitution as surely as in the *Shoshone* case, *supra*."[42]

The Opinion of the Washington Supreme Court:

The Washington Supreme Court addressed itself largely to the question whether RCW ch. 37.12 is a valid enactment as complying with the provisions of Public Law 83-280.[43] Upholding the enactment, the

[41] R. 132, pp. i, ii.
[42] R. 132, p. 41
[43] Appendix A, p. A-6

Court then touched briefly upon the two questions presented in this appeal. Its entire analysis of those profoundly significant questions is as follows:

> "And, finally, it is urged that the state has no jurisdiction over the roads on the Makah Indian Reservation because the roads lay on lands held in trust by the United States for the tribe or for individual allottees of the tribe. It is pointed out that Article 2 of the United States Treaty with the Makah Tribe of Indians dated January 31, 1855 (12 Stat. 939 (1863)) 'reserved for the present use and occupation of the said tribe the following tract of land . . . which said tract shall be set apart . . . and marked out for their exclusive use,' and that such 'exclusive use' prohibits state interference. We point out, however, that another portion of the same article further provides that 'if necessary for the public convenience, roads may be run through the said reservation.'
>
> "Thus, the federal government reserved to itself the right in the Treaty to build roads on the reservation where necessary for the public convenience, and the record before us sufficiently sustains the argument that the roads in question were built by the government for that purpose. Additionally, 25 C.F.R. §162.6 (1968) concerning roads of the Bureau of Indian Affairs, which would include the roads here in question, provides that the 'Roads subject to the regulations in this part shall be open for free public use.'
>
> "The state does not claim title to the roads. It merely asserts that they are public roads by virtue of the foregoing authorities, and therefore vehicles being operated on them are subject to jurisdictional control of the state under the terms of RCW 37.12.010.
>
> "The judgment of the trial court is affirmed."[44]

[44] Appendix A, pp. A-10, A-11

THE FEDERAL QUESTION IS SUBSTANTIAL

The question whether the State of Washington can create a property interest in trust land on the Makah Indian Reservation through a seemingly innocuous assumption of jurisdiction over "Operation of motor vehicles upon the public highways," presents a substantial federal question. Indeed, it reaches to the basic foundations of Indian property rights and Indian tribal government.

For hundreds of years, the American Indian has seen the erosion of his property rights, even those described as "sacred guarantees" in his treaties. The two-fold erosion of Indian property rights in the instant case is the more insidious since any direct discussion of the very premise upon which it is predicated —namely, transmutation of roads on trust land on the Reservation into state public highways by operation of either 25 C.F.R. §162.6 or RCW ch. 37.12 — is skirted by the Washington Supreme Court. First, the Court notes the Makah Treaty provision giving the federal government the right to build roads on the Reservation for "public" convenience. Then the Court seizes upon the word "public" used in 25 C.F.R. §162.6, and concludes that the detailed federal statutes and regulations governing the building of state public highways on reservations no longer apply and that by reason of the regulation alone, roads on the Makah

Reservation are open to the general public as a matter of right. But a public "right to use" roads on the Makah Indian Reservation would inevitably create a state property right to Indian trust land.

The logic is clear. The definition of "public highway" governing the instant case[45] is contained in RCW 46.04.430, which reads as follows:

> "'Public highway' includes every way, lane, road, street, boulevard, and every way or place in the state *open as a matter of right to public vehicular travel* both inside and outside the limits of cities and towns." (Emphasis supplied.)

In *Burmeister v. Howard*, 1 Wash. Terr. 207 (1867), the Washington Supreme Court held that a public highway *encumbers* the underlying land with a right of passage in the public. It is beyond cavil that an encumbrance upon land is a property right.

In the Opinion of the Attorney General of the State of Washington, cited with approval by the trial court,[46] AGO 63-64, Number 25, the question whether *title* to a public highway need be in the state was discussed thoroughly, and the Attorney General concluded that

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[45] It should be noted that the definition of "public highway" contained in RCW, Title 47, entitled "Public Highways" is as follows:

> "Every way, lane, road, street, boulevard, and every way or place in the state of Washington open as a matter of right to public vehicular travel both inside and outside the limits of incorporated cities and towns." RCW 47.04.010(29).

[46] Appendix B, p. B-4

the property right prerequisite to classification of a highway as public need only be "a public use." The reasoning of the state attorney general appears to have seduced the Washington Supreme Court, but is, nevertheless, erroneous, for an encumbrance is an encumbrance whatever the synonym offered for it. And in point of fact, its Opinion makes clear that the Washington Supreme Court has adjudicated that since the United States has the right to open roads into the Reservation, and since the Bureau of Indian Affairs has classified the roads here in question as "Bureau of Indian Affairs Roads" and since such roads are by 25 C.F.R. §162.6 "open for free public use," therefore, the general public has a vested right to use roads on the Reservation which have now become state "public highways."

The fallacy of the Washington Supreme Court's reasoning is demonstrable. Congress has long followed a practice of enacting legislation specifically delineating the kind and extent of jurisdiction which it wished to give states over federal areas. The matter is exhaustively discussed in an Interdepartmental Committee Report entitled "Jurisdiction Over Federal Areas Within the States."[47] Congress' method of

[47] Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States. *Jurisdiction Over Federal Areas Within the States*, U.S. Government Printing Office: 1956.

giving such jurisdiction to a state is to enact legislation providing for the granting of easements in or rights-of-way over federal lands and concurrently to cede to the state jurisdiction over the area involved in the grant.[48] Congress acted in precisely this fashion in granting the State of Washington easements for rights-of-way for public highways on the Vancouver Barracks Military Reservation.[49]

On the other hand, the federal government has constructed and maintains many roads on federal areas in the State of Washington, over which the State clearly has no jurisdiction, for example, Olympic National Park and Mount Rainier National Park. As in the instant case, federal regulations govern these roads. 36 C.F.R., Chapter 1, Part 4, §4.19, states in part:

> "(a) Operating a vehicle outside of established *public* roads, parking areas, or routes designated by the Superintendent is prohibited." (Emphasis supplied.)

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[48] *Ibid.*, Part II, p. 93.

[49] 55 Stat. 608. The act reads in part:

> "That the Secretary of War be, and he is hereby authorized to grant to the city of Vancouver, Washington, easements for rights-of-way for street or public highway purposes over such roads on the Vancouver Barracks Military Reservation, Washington, as the Secretary of War may designate, . . .
>
> * * *
>
> "Sec. 2. There is hereby granted to the State of Washington a retrocession of jurisdiction over such rights-of way as may be granted hereunder by the Secretary of War to the city of Vancouver, subject to all of the condition, restrictions, and reservations as may be contained in the grant."

Thus, roads and parking areas for use by visitors to the two national parks are characterized as "public." But if the Washington Supreme Court's premise in the instant case were true, i.e., that the mere characterization of federal roads as "public" in federal regulations changes them into state public highways, then the State of Washington would have a vested property right in roads in the two national parks and, as a consequence, jurisdiction over operation of motor vehicles therein—a preposterous conclusion!

The United States has "sole and exclusive jurisdiction" over the two national parks,[50] and Congress has delegated authority to the Secretary of the Interior to construct and maintain roads therein.[51] Finally, Congress has provided for federal enforcement of traffic regulations on parks' roads.[52]

The entire history of the relationship between the federal government and Indian tribes bears out the firm conclusion that no property right of any kind can be obtained on trust land on an Indian reservation without a specific federal grant. Basic to the proposition are the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. *Shoshone Tribe of Indians v. United States*,[53]

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[50] 16 U.S.C. §§95 and 256
[51] 16 U.S.C. §8
[52] 16 U.S.C. §10
[53] 299 U.S. 476 (1937)

dealt with the Wind River Reservation which had been "...set apart for the absolute and undisturbed use and occupation of the Shoshone Indians..." in their treaty. In that case the Bureau of Indian Affairs placed a transient band of Arapahoes on the Wind River Reservation without the consent of the Shoshones. Justice Cardozo noted that:[54]

> "Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy *with all its beneficial incidents. United States v. Creek Nation, supra,* p. 109." (Emphasis supplied.)

and the Court held that placement of the Arapahoes on the Reservation was a partial taking of the Reservation for which the Shoshones were entitled to compensation under the due process clause of the Fifth Amendment. Justice Cardozo further stated:[55]

> "The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs v. United States,* 290 U.S. 13, 16; *United States v. Cress,* 243 U.S. 316, 327-330; *Hurley v. Kincaid,* 285 U.S. 95, 104. Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. . . . Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf v. Hitchcock*

[54] *Ibid.*, p. 496
[55] *Ibid.*, p. 497

> 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render just compensation . . .' for that 'would not be an exercise of guardianship, but an act of confiscation.'" *United States v. Creek Nation, supra*, p. 110; citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308."

In keeping with the philosophy of *Shoshone*, Congress has repeatedly enacted federal statutes which preclude states from obtaining any property right to trust lands on Indian reservations in the absence of a federal grant. 25 U.S.C. §177, entitled "Purchases or Grants of Lands From Indians," provides in part:

> "No purchase, grant, lease, or other conveyance of lands, or of *any title or claim thereto*, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ." (Emphasis supplied.)

and has been held to apply equally to voluntary grants of interest in Indian tribal lands and to involuntary acquisition of interests in such lands.[56]

Congress has acted specifically regarding establishment of state public highways on Indian reservations. 25 U.S.C. §311 states:

> "The Secretary of the Interior is authorized to grant permission, *upon compliance with such re-*

[56] *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (1938)

> *quirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways,* in accordance with the laws of the State or Territory in which the lands are situated, *through any Indian reservation or through any lands which have been allotted in severalty* to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation." (Emphasis supplied.)

Further, 25 C.F.R., part 161, contains the detailed federal requirements for establishing state public highways in Indian reservations pursuant to the above statute. The State of Washington has made no attempt to comply with these regulations,[57] hence, no road on the Makah Indian Reservation can possibly be a state public highway.

Nor can the State maintain that Public Law 83-280, which enabled the State to assume jurisdiction over Makahs on their Reservation, in any way operated to transmute roads on trust land into state public highways or to grant the general public a right to use them. On the contrary, section 2 of the Act, 18 U.S.C. §1162 (b), effectively spikes any such contention.

> "(b) Nothing in this section shall authorize . . ., encumbrance, . . . of any real . . . property, . . . held in trust by the United States . . .; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; . . . ."

[57] R. 70, 11. 7-30

The conclusion is plain, then, that the federal government cannot through 25 C.F.R. § 162.6 change roads on trust land on the Makah Indian Reservation into state public highways and that the State of Washington cannot do so through RCW ch. 37.12. Accordingly, RCW ch. 37.12 is repugnant to Article I, section 8, clause 2 of the United States Constitution, the 14th Amendment of the United States Constitution, section 1, clause 2, the Makah Treaty, 25 U.S.C. §§177 and 311, and 18 U.S.C. §1162.

Another substantial federal question presented in the instant case, and which was completely ignored by the Washington Supreme Court in its Opinion, is severe restriction of the right of the Makah Indian Tribe to exclude non-Indians from the Reservation implicit in RCW ch. 37.12 as applied.

As a tribe, the Makah Indian Tribe has inherent, sovereign authority to exclude non-Makahs from entry onto the Reservation. As stated by the United States Solicitor in 55 I.D. 14:[58]

> ". . . the basic principle that an Indian tribe *may exclude* private individuals from the territory within its jurisdiction, *or prescribe the conditions upon which such entry will be permitted*, has been followed in a long line of cases.
>
> "Two grounds for this power of exclusion are established by the decided cases: first, the Indian

[58] 55 I.D. 14 (October 25, 1934), p. 48

> tribe may exercise, over all tribal property, the rights of a landowner; second, the tribe may, in the exercise of local self-government, *regulate the relations between its members and other persons*, so far as may be consistent with Congressional statutes governing trade and intercourse." (Emphasis supplied.)

The opinion further states:[59]

> "Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, *the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business,* provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority. *Morris v. Hitchcock* (194 U.S. 384) and other cases cited under heading 'The Taxing Power of an Indian Tribe'." (Emphasis supplied.)

As a federal corporation organized under the Indian Reorganization Act, 25 U.S.C. §461, *et seq.*, *the Makah* Indian Tribe acquired enumerated rights and powers "in addition to all powers vested in any Indian tribe or tribal council by existing law...."[60] That this phrase incorporated the inherent sovereign power of the Makah Indian Tribe to exclude non-Makahs from the Reservation is best expressed as follows:[61]

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[59] *Ibid.*, p. 50
[60] 25 U.S.C. §476
[61] 55 I.D. 14 (October 25, 1934), p. 19

> "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. *What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, 'powers vested in any Indian tribal council by existing law.'*" (Emphasis supplied.)

As pointed out on page 8, the Makah Treaty expressly incorporates the tribal rights to exclude non-Makahs from the Reservation and that right is embodied in the Tribal Constitution.

As applied by the Opinion of the Washington Supreme Court, RCW ch. 37.12 virtually extinguishes this significant attribute of tribal government on the Reservation, for if the general public has a vested right to use roads on the Reservation, whatever the genesis of that right, the Makah Indian Tribe may be precluded from determining who can enter the Reser-

vation and thus the governmental sovereignty of the Tribe may be substantially diminished. Accordingly, RCW ch. 37.12 is repugnant to Article I, section 8, clause 2 of the United States Constitution, the Makah Treaty, 25 U.S.C. §476, and the Tribal Constitution. Finally, it clearly constitutes a "regulation of the use" of trust land on the Makah Indian Reservation in direct contravention of 18 U.S.C. §1162(b).

Thus, the federal questions raised in this appeal are as substantial as the basic right of the Makah Indian Tribe to maintain the integrity of trust land on the Makah Indian Reservation and to maintain its sovereignty as an Indian tribe and as a federal corportion. If the decision of the Washington Supreme Court is allowed to stand, it would largely destroy the private property aspect of Indian trust lands and grant the non-Indian public a vested right of entry into Indian reservations. Consequently, it would constitute the taking of a substantial interest in Indian trust land without consent and without compensation to the Indian landowners.

This case is appealed pursuant to 28 U.S.C. §1257 (2) from the highest court of the State of Washington, the Washington Supreme Court.[62] The appeal is taken from the Washington Supreme Court's Remittitur,

[62] Constitution of the State of Washington, Article IV, §§1, 2, 3, 4.

which constitutes the final judgment of the Washington Supreme Court, and which became effective as of its date of entry, September 9, 1969. It is not subject to further correction or review since it stems from a decision en banc.

The decision of the Washington Supreme Court affirmed the decision of the Superior Court of Washington for Thurston County. Both courts sustained the validity of RCW ch. 37.12, against the contention of the Makah Indian Tribe that it violated Article I, section 8, clause 2 of the United States Constitution, the 14th Amendment of the United States Constitution, Section 1, clause 2, the Makah Treaty, 18 U.S.C. §1162, 28 U.S.C. §1360 and 25 U.S.C. §§177, 311 and 476 *et seq.* Both courts based their opinions upon federal grounds.[63] The raising of the federal questions was timely and they were so presented as to qualify for an appeal pursuant to 28 U.S.C. §1257(2).[64]

CONCLUSION

This appeal raises the important federal questions whether the State of Washington can create a state property interest in trust land on the Makah Indian Reservation and thereby severely restrict the sover-

[63] Appendices A and B

[64] *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

eign authority of the Makah Indian Tribe to determine who can enter the Reservation. The federal questions are substantial and for proper resolution and plenary consideration require briefs on the merits and oral argument. Determination of these matters is necessary to maintain the plenary power of the United States over Indian tribes and trust land on Indian Reservations, to protect Indian tribes in their exercise of governmental sovereignty, and to protect their private property from state invasion.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAKAH INDIAN TRIBE, as a tribe and as a Federal corporation, on its own behalf and on behalf of each of its members, *Appellant*, v. STATE OF WASHINGTON, *Respondent*.	No 39398 EN BANC Filed August 7, 1969

McGOVERN, J. — The Makah Indian Tribe brought this action against the State of Washington in declaratory form, seeking a judgment affirming its argument that the state has no authority to enforce its civil or criminal laws against members of the tribe on the reservation and declaring that reservation roads are not public highways of the state. The tribe appeals from an adverse judgment.

In 1889, the states of Washington, Montana, North Dakota and South Dakota were given provisional authority to become members of our Union of States. 25 Stat. 676 (1889). The enabling act provided as a prerequisite to admission that each such state seeking admission should hold a constitutional convention and provide among other things,

> by ordinances irrevocable without the consent of the United States and the people of said States:
>
> . . .
>
> That the people inhabiting said proposed States

> do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . .

In response to that enabling act qualification, we thereafter adopted article 26 to the Washington State Constitution as follows:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this state:
>
> • • •
>
> That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

Then in 1953, our federal government moved affirmatively away from its position of retaining absolute control and jurisdiction over Indians and their lands. Public Law 83-280 (67 Stat. 588 (1953)) was passed, granting specific authority to the states of California,

Minnesota, Nebraska, Oregon and Wisconsin to assume and exercise both civil and criminal jurisdiction over certain Indian tribes and lands within those states. The act authorized other states also to move into the field of control.

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Responsively, our state legislature enacted Laws of 1957, ch. 240, p. 941, obligating this state to assume civil and criminal jurisdiction over Indians and Indian territory, reservations, country and lands within the state if and when the tribe or its governing body adopted a resolution asking the state to do so. There-

after, in 1963, the act was amended to read in part as follows:

> The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
>
> (1) Compulsory school attendance;
> (2) Public assistance;
> (3) Domestic relations;
> (4) Mental illness;
> (5) Juvenile delinquency;
> (6) Adoption proceedings;
> (7) Dependent children; and
> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

RCW 37.12.010

The Makah Indian tribe has not adopted a resolution asking the Governor to proclaim total state civil and criminal jurisdiction over its members and territory. As to that tribe then, such total state jurisdiction

over its members exists only when the tribal members are on non-trust property or on property held in trust for them by the United States, and when the incident involves a matter of law within one of the eight enumerated exceptions.

Appellant argues that the state has no jurisdiction over enrolled members of its tribe or over lands belonging to the tribe or to its members, whether held in trust or otherwise. The basis of the argument is threefold: (1) that the method employed by the state in assuming jurisdiction over the Makahs violated the terms of the enabling act and our state constitution; (2) that the method employed by the state in assuming jurisdiction over the tribe violated the terms of Public Law 83-280; and (3) that Public Law 83-280 does not permit a state to assume only partial jurisdiction over the tribe and its lands.

Preceding the state's jurisdictional disclaimer over Indians and Indian lands in section 4 of the enabling act and article 26 of our constitution was the proviso that the ordinance was "irrevocable without the consent of the United States and the people of this state." The question raised by the tribe then is whether the consent of the people of this state to the revocation of that ordinance was properly granted when it was made by vote of the legislature rather than by popu-

lar vote of the people through constitutional amendment.

When Public Law 83-280 (67 Stat. 588 (1953)) was enacted, there were eight states whose enabling acts or constitutional provisions prohibited the states from exercising jurisdiction over the Indians within the state: Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and Washington. Senate and House Committee Reports on H.R. 1063, 1953 U.S. Code Cong. & Ad. News 2412. Of those states, Arizona, Oklahoma, Utah and New Mexico have continued to reject the invitation to assume such jurisdiction. The remaining four states all joined the Union under the same 1889 enabling act and each assumed jurisdiction over the Indians in their state, but by different routes. North Dakota amended its constitution in 1958 and assumed jurisdiction over its Indians by statute in 1963 (NDCC § 27.19.01 (1963), *et seq.)*. South Dakota assumed jurisdiction by legislative action (S.D. Laws of 1957, ch. 319, p. 427) as it was authorizd to do under the terms of its compact with the United States. South Dakota Const., art. 22. Montana also assumed jurisdictional control by statute (Repl. 5 RCM §83-801 (1963), *et seq.)*

Washington, too, selected the legislative method and we have judicially approved the constitutionality of that procedure. In *State v. Paul*, 53 Wn.2d 789, 337

P.2d 33 (1959) we considered the identical question and reaffirmed the holding earlier explained in *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wn. 2d 652, 171 P.2d 838, 168 A.L.R. 539 (1946) that as far as article 26 is concerned "the makers of our constitution had in mind that the people would speak through the mouth of the legislature." We said in *Paul*, at 793, and we repeat:

> We believe that this reasoning is still sound. It will be noted that the framers of our constitution, in enacting Art. XXVI, *supra*, adopted the identical words found in the enabling act. Apparently, this was done to conform with the requirements imposed by Congress for admission of Washington state into the Union. Congress did not require that this compact clause be irrevocable, absent a Washington state constitutional amendment. Rather, Congress insisted on bilateral action by the people of the United States (speaking through Congress) and the people of the state of Washington (speaking through the legislature).

Of additional import is *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966). There, the Quinaults sought declaratory and injunctive relief to prevent the state of Washington from asserting jurisdiction over them under authority of RCW 37.12 as amended. They argued that the "people" of this state within the meaning of article 26 can speak only by constitutional amendment and not through the legislature. The federal court considered that argument

and said, at 657:

> This contention rests on the premise that, within the contemplation of Congress, a state is powerless to manifest the consent of its "people" by legislative action, but may do so only by constitutional amendment, at least where the waiver is set forth in the state constitution.
>
> Assuming, without deciding, that this provision of the enabling act should be considered federal and not local law, we hold that it does not require that the consent of the "people" of Washington be manifested only by a constitutional amendment. As we stated above, all that concerned Congress was that the consent of the people be evidenced in some manner valid and binding under state law. The *Paul* case establishes that this was accomplished by the 1957 and 1963 legislative enactments.

We are of the view that the reasoning set forth in the *Boeing, Paul* and *Quinault* cases is logical and sound. We therefore hold that the legislative method of assuming state civil and criminal jurisdiction over the Makahs as provided in RCW 37.12 was proper and not in violation of the provisions of our enabling act or state constitution.

Nor was it a violation of the method prescribed in Public Law 83-280 for the assumption of state civil and criminal jurisdiction over the Makah. The tribe argues that such law, in addition to our enabling act and state constitution, necessitates a constitutional amendment before jurisdiction can be assumed by the

state. The basis for the argument is section 6 of the act (67 Stat. 590, §6 (1953). Such argument was disposed of by the federal court in *Quinault* when it said, at 656:

> Inasmuch as the Washington state disclaimer of jurisdiction was set forth as Article 26 of the state constitution, it is understandable that congressional spokesmen assumed that such disclaimer could be removed only by a constitutional amendment. But the underlying concern of Congress, we think, was not that a state disclaimer be removed in any particular way, but that it be removed in some way which would be valid and binding under state law, before federal jurisdiction be relinquished. Accordingly, we do not construe this legislative history as reading into Public Law 280 a requirement that Washington can remove its disclaimer only by a state constitutional amendment.

And then it added: "In our opinion, these state legislative enactments, upheld as to validity by the state supreme court, are in full compliance with the federal requirements." We agree with that conclusion.

It is next argued that RCW 37.12 as amended is invalid because it constitutes only a partial assumption of jurisdiction over the Makahs, whereas the authorizing legislation (Public Law 83-280) requires the state to take total state jurisdiction or none at all. Again, this argument was raised in *Quinault* and disposed of in that cause. We adopt the reasoning of that court as applicable here:

> We do not read that act [RCW 37.12] as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation. In ch. 240, Laws of 1957, this Indian resolution and governor's proclamation procedure applied to all exertions of state jurisdiction.
>
> In our opinion, the indicated condition precedent to the exertion of state jurisdiction as to some matters concerning some Indians involves no violation of Public Law 280. If the [Makah] Tribe of Indians feels aggrieved because state jurisdiction is not presently being exerted to the full extent possible under chapter 36, all it has to do is provide the governor with a tribal resolution of the kind called for in section 5 of that act (RCW 37.12.021). A governor's proclamation would necessarily follow, and a full exertion of state jurisdiction would be achieved.

And, finally, it is urged that the state has no jurisdiction over the roads on the Makah Indian Reservation because the roads lay on lands held in trust by the United States for the tribe or for individual allotees of the tribe. It is pointed out that article 2 of the United States Treaty with the Makah Tribe of Indians dated January 31, 1855 (12 Stat. 939 (1863)), "reserved for the present use and occupation of the said tribe the following tract of land . . . which said tract shall be set apart . . . and marked out for their exclu-

sive use," and that such "exclusive use" prohibits state intereference. We point out, however, that another portion of the same article further provides that "if necessary for the public convenience, roads may be run through the said reservation."

Thus, the federal government reserved to itself the right in the Treaty to build roads on the reservation where necessary for the public convenience, and the record before us sufficiently sustains the argument that the roads in question were built by the government for that purpose. Additionally, 25 C.F.R. § 162.6 (1968), concerning roads of the Bureau of Indian Affairs, which would include the roads here in question, provides that the "Roads subject to the regulations in this part shall be open for free public use."

The state does not claim title to the roads. It merely asserts that they are public roads by virtue of the foregoing authorities, and therefore vehicles being operated on them are subject to jurisdictional control of the state under the terms of RCW 37.12.010.

The judgment of the trial court is affirmed.

/s/ McGovern, J.

WE CONCUR:

Hunter, C. J.
Hill, J.
Finley, J.
Weaver, J.
Hamilton, J.
Rosellini, J.
Hale, J.
Neill, J.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

MAKAH INDIAN TRIBE, as a tribe and as a Federal corporation, on its own behalf and on behalf of each of its members, *Plaintiff*, v. THE STATE OF WASHINGTON, *Defendant*.	No. 37537 Memorandum Opinion

This matter was heard before the court on the 9th day of August, 1966. The plaintiff, Makah Indian Tribe, was represented by its attorney, Mr. Robert L. Pirtle, and the defendant, State of Washington, was represented by Jane Dowdle Smith, Assistant Attorney General. Testimony was taken; the court heard the argumnts of counsel and the court rendered an oral opinion at that time. A court reporter was not available at the time of the rendering of the oral opinion and therefore, the court feels, under the circumstances, it should write a short memorandum opinion covering its oral opinion in this matter.

The first allegation of the plaintiff herein arises as to the constitutional question as to the enforceability of RCW 37.12.010 as amended by the Legislature in 1963. The plaintiff argues that under Section 6 of

Public Law 82-280, as passed by Congress, it was necessary for the State of Washington to amend the State Constitution, remove the legal impediment to the assumption of civil and criminal jurisdiction by the State of Indian lands. The court is satisfied that this is a State question and has been answered in the case of *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33. From the holding in this case the court is satisfied that the State of Washington has complied with the terms of Section 6 of Public Law 82-280 and has removed the legal impediment to assumption of civil and criminal jurisdiction in accordance with the provisions of that act by the passing of legislation by the Legislature of the State of Washington in 1957 and 1963 embodied in RCW 37.12.010 *et seq.*

The court is further satisfied that under the provisions of Public Law 82.280, *supra*, the court can find no restriction therein as to the State assuming partial jurisdiction at any time as provided in the eight enumerated areas in RCW 37.12.010 as amended by the State Legislature in 1963.

The testimony taken before the court related primarily to the question of the enforceability of that provision of RCW 37.12.010 relating to the operation of motor vehicles upon public streets, alleys, roads and highways within the Makah Indian Reservation. It was the plaintiff's contention that there are no public

highways under the laws of the State of Washington existing on the Makah Indian Reservation and therefore, that provision of RCW 37.12.010 providing for jurisdiction over the operation of motor vehicles upon public streets, alleys, roads and highways within the Reservation has no effect upon the roads situated within the Makah Indian Reservation.

The court is satisfied from the evidence that many of the roads on the Makah Indian Reservation have been improved with public funds through the Bureau of Indian Affairs over a period of a number of years and the evidence further shows to the satisfaction of the court that as to the incidences of arrest which are laid out in the complaint of the plaintiff; these arrests were made upon Bureau of Indian Affairs roads which either the construction thereof or the improvement or maintenance thereof were done with public funds through the Bureau of Indian Affairs. The defendant, in argument that these roads are public roads, cites Volume 25, Code of Federal Regulations, Part 162, which deals with the current federal regulations concerning the roads of the Bureau of Indian Affairs and the status of same and it provides under Section 162.6 as follows:

> "Roads subject to the regulations in this part shall be open for free public use. When required for public safety, fire prevention or suppression or fish or game protection, or to prevent damage

to unstable roadbed, the Secretary may close them to public use."

The court is satisfied from the evidence, arguments and briefs of counsel that by federal standards, a great number of the roads situated on the Makah Indian Reservation and specifically that portion thereof cited in the complaint of the plaintiff herein were open for public use.

The plaintiff further argues that the defendant has failed to show that a title to the roadbeds themselves have been either given to the Federal Bureau of Indian Affairs or specifically the State of Washington. Nor has the tribal council taken any action that could be considered as having given the actual title to the land on which roadbed lies to any of the above-entitled agencies. As to the laws of the State of Washington, the court is satisfied as was held in the opinion of the Attorney General, being (AGO 63-64 No. 25) that the Legislature as so far as public roads did not intend to include the necessity of public ownership of the land as a condition to a definition of public highways but must look to the actual use and if the use of said roads were sufficient to constitute a public use, then this is all that is necessary to fall in under the definition of public highways under RCW Chapter 46 or Chapter 47. Further, the court is satisfied under Federal Law and the Federal Rules and Regulations that it

is not necessary that title to the land be conveyed to the public in order to establish a public road.

The court is of the opinion that certain roads used for motor vehicular traffic in the Makah Indian Reservation are public streets, alleys, roads and highways under the provisions of RCW 37.12.010 and are subject to provisions of said section.

It is, therefore, the opinion of the court that RCW 37.12.010 is constitutional and that there are public streets, alleys, roads and highways within the Makah Indian Reservation subject to the provisions of said RCW 37.12.010 and specifically those public roads and highways under paragraph V and VI of plaintiff's complaint. The court is satisfied from the evidence produced here that it is in no position to designate each and every road which will satisfy the requirements of being a public street, alley, road or highway upon the Makah Indian Reservation and its opinion is eminent to the finding that some of the roads and some of the streets, alleys, roads and highways are public and specifically those included in the complaint herein.

The court will sign Findings of Fact, Conclusions of Law and a Judgment conforming to this memorandum opinion.

DATED this the 15th day of November, 1966.

/s/ HEWITT A. HENRY, *Judge*

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

THURSTON COUNTY No. 37537

MAKAH INDIAN TRIBE, as a tribe and as a Federal Corporation, on its own behalf and on behalf of each of its members, *Appellant*, v. STATE OF WASHINGTON, *Respondent*.	No. 39398 REMITTITUR

That State of Washington to:
The Superior Court of the State of Washington,
in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on August 7, 1969, became the final judgment of this court in the above-entitled case on September 8, 1969. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.

cc: ZIONTZ, PIRTLE & FULLE
MR. ROBERT L. PIRTLE
MR. ALVIN J. ZIONTZ

HOVIS, COCKRILL & ROY
MR. JAMES B. HOVIS

HON. SLADE GORTON
Attorney General
MRS. JANE DOWDLE SMITH

Court Reporter

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 9th day of September, A.D. 1969.

WILLIAM M. LOWRY
Clerk of the Supreme Court.
State of Washington.

APPENDIX D

APPENDIX D

CONSTITUTIONAL AND TREATY PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provisions:

United States Constitution, Art. I § 8, cl. 2

> "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Constitution, 14th Amendment, §1, cl. 2

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Treaty Provisions:

The Makah Treaty, 12 Stat. 939, Art II

> "There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz.: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive

use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so."

United States Statutes

Public Law 83-280, 67 Stat. 588 (1953).

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2, Title 18, United States Code, is hereby amend-

ed by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right

privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3 Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties.

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any En-

abling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

25 U.S.C. 177

Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or

convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to land within such State, which shall be extinguished by treaty. R.S. §2116.

25 U.S.C. 311—

Opening highways

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not

been conveyed to the allottee with full power of alienation. March 3, 1901, c. 832, § 4, 31 Stat. 1084.

25 U.S.C. 476

Organization of Indian Tribes; Constitution and Bylaws; Special Election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To

employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, §16, 48 Stat. 987.

State Statutes:

Revised Code of Washington, Chapter 37.12.

INDIANS AND INDIAN LANDS—
JURISDICTION

Sections

37.12.010 Assumption of criminal and civil jurisdiction by state.
37.12.020 Resolution of request—Proclamation by governor. [Repealed.]
37.12.021 Resolution of request.
37.12.030 Effective date for assumption of jurisdiction—Criminal causes.
37.12.040 Civil causes.
37.12.050 State's jurisdiction limited by federal law.
37.12.060 Chapter limited in application.
37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes.

37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further,* That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

37.12.020 Resolution of request—Proclamation by governor. [Repealed]

37.12.021 ——Resolution of request — Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

37.12.030 Effective date for assumption of jurisdiction—Criminal causes. Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.040 ——Civil causes. Upon March 13, 1963

the state of Washington shall assume jurisdiction over civil causes of action as set forth in RCW 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in the chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within the state.

37.12.050 State's jurisdiction limited by federal law. The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

37.12.060 Chapter limited in application. Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive

any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.

37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

Federal Regulations:

25 C.F.R. §162.6

Use of Roads

Roads subject to the regulations in this part shall be open for free public use. When required for public safety, fire prevention or suppression, or fish or game protection, or to prevent damage to unstable roadbed, the Secretary may close them to public use.

SUPREME COURT, U. S.
FEB 21 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1969

No. 922

MAKAH INDIAN TRIBE, as a tribe and as a Federal corporation, on its own behalf and on behalf of each of its members,
Appellant,
v.
STATE OF WASHINGTON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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IN THE

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Appellant,

v.

STATE OF WASHINGTON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Appellee pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss this appeal on the ground that the judgment rests on an adequate nonfederal basis, or to affirm the decision of the Supreme Court of the State of Washington.

OPINION BELOW

The opinion of the Washington State Supreme Court is reported in 76 W.D.2d 645, 457 P.2d 590 (1969) printed as Appendix A in appellant's brief.

QUESTION PRESENTED

Can the State of Washington assume jurisdiction over the operation of motor vehicles upon the public streets, alleys, roads and highways of the Makah Indian Reservation pursuant to a state law authorizing assumption of such jurisdiction enacted pursuant to the provisions of Public Law 83-280?

STATUTE INVOLVED

The statute which is the basis for this appeal is chapter 240, Laws of 1957 (Chapter 37.12 RCW) as amended by chapter 36, Laws of 1963. The pertinent section of that statute is section 1, chapter 36, Laws of 1963 (RCW 37.12.010) which provides as follows:

> "The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the pro-

visions of RCW 37.12.021 have been invoked, except for the following:

"(1) Compulsory school attendance;
"(2) Public assistance;
"(3) Domestic relations;
"(4) Mental illness;
"(5) Juvenile delinquency;
"(6) Adoption proceedings;
"(7) Dependent children; and
"(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."[1]

ARGUMENT

The decision of the Washington State Supreme Court upholding the validity of the enactment of chapter 37.12 RCW is clearly within the provisions of Public Law 83-280 (Section 6—authorizing the state to assume civil and criminal jurisdiction over Indian tribes and reservations).

In 1957 the legislature of the state of Washington adopted chapter 37.12 RCW which authorized the state to assume jurisdiction over Indian tribes within the state under certain conditions pursuant to the authority given to the states under Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360). Subsequently in 1963, the legislature amended chapter

[1]Appellant's Appendix D-9-13.

37.12 RCW and assumed state jurisdiction over all Indian tribes and reservations with regard to eight specific areas of law, one of which was the operation of motor vehicles upon public streets, alleys, roads and highways. The Makah Indian Tribe has never petitioned the governor to issue a proclamation assuming total state criminal and civil jurisdiction over the Makah Reservation under the 1957 act. However, the 1963 amendments to chapter 37.12 RCW apply to the Makah Tribe and Reservation as well as to all other Indian tribes and reservations within the state without regard to any other state jurisdiction.

The main issue involved in this appeal is whether the State of Washington has the authority under its constitution to assume jurisdiction over Indian tribes and reservations within this state pursuant to the provisions of Public Law 83-280 by legislative enactment and without amending Article 26 of the State Constitution. This question has been decided in the affirmative by the United States Court of Appeals for the Ninth Circuit in the case of *The Quinault Tribe of Indians, et al. v. A. M. Gallagher, et al.*, 368 F.2d 648, Cert.Den., 387 U.S. 907.[2] In that case, the court took notice of the case of *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) in which the Supreme Court of the State of Washington upheld the validity of the 1957 enactment of chapter 37.12 RCW on the grounds that the legislative enact-

[2]Appendix A.

ment represented the consent of the people of the state under Article 26 of the Washington State Constitution, and that a specific amendment of Article 26 by the voters of the state was not required.

The circuit court ruled that the federal courts were bound by the Washington State Supreme Court pronouncement as to state law and further that:

> "In our opinion, these state legislative enactments, upheld as to validity by the state supreme court, are in full compliance with the federal requirements."[3]

The court also discussed the argument of plaintiffs that the 1963 amendment of chapter 37.12 RCW was void because it represented only a partial assumption of state jurisdiction over Indian reservations which was not within the purview of Public Law 83-280. The circuit court upheld the 1963 enactment and ruled that it was not a partial assumption of jurisdiction since the state had expressed its willingness to assume complete criminal and civil jurisdiction over Indians and Indian reservations, but that with regard to some matters, a tribal resolution and a gubernatorial proclamation were required.

The argument of appellant that the 1963 amendment to RCW 37.12.010 creates state public highways on the Makah Indian Reservation is totally without merit. In the decision of the Washington State Supreme Court from which this appeal was

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[3] Appendix A.

taken, the court pointed out that the state does not claim title to the roads, but merely asserts that they are public roads, and accordingly, vehicles being operated on them are subject to the jurisdictional control of the state under the terms of RCW 37.12-.010. The state has not at any time asserted that it constructed any roads on the Makah Indian Reservation or that it owned any property interest in trust land on the Makah Indian Reservation, but it has asserted jurisdiction over the "public roads, streets, alleys and highways" on the Makah Indian Reservation to the same extent the state has jurisdiction over such roads throughout the state. Thus, the highways in question were never alleged to be *state* public highways and in fact are not *state* public highways, but are public highways under the provisions of the Code of Federal Regulations and state law.[4]

In addition, the Treaty between the United States Government and the Makah Indian Tribe[5] specifically provided authority for the federal government, if necessary for the public convenience, to put roads through the reservation. The public roads which are involved in the present case are part of the Bureau of Indian Affairs road system which was originally laid out by the bureau in 1917 at the time the Village of Neah Bay was platted. The main road through the reservation (PS #1), where the arrests

[4]Appellant's Appendix A.

[5]Exhibit 11.

[6]Appellant's Appendix D-1-2.

of Indian tribal members were made for operation of a motor vehicle without a driver's license, was constructed in 1928 by the bureau at the request of the tribe. At that time there were no federal laws or regulations relating to the construction of roads on Indian reservations. No federal regulations were promulgated by the Secretary of the Interior relating to the construction by the federal government of roads on Indian reservations until 1938. In that year, federal regulations were promulgated by the Secretary of the Interior and subsequently in 1957, 25 C.F.R. entitled "Roads of the Bureau of Indian Affairs" was promulgated supplementing the earlier regulations and providing in section 162.6 that:

> "Roads subject to the regulations in this part shall be open for free public use."

In a letter dated March 28, 1958 from the Office of Regional Solicitor, Portland, Oregon, to the Assistant Area Director of the Bureau of Indian Affairs,[7] it was pointed out that prior to 1938 no written consent of the Indian allottees for rights of way across individual allotments was required, and there could be implied consent from the acceptance by the allottee of the benefits of the road. The letter further pointed out that many of the early roads were constructed under C.C.C. laws and regulations, and consent was obtained by C.C.C. personnel, but that the consents obtained by the C.C.C. are not in the records of the Department of the Interior.

[7] Exhibit 8

In a letter dated July 10, 1963 from the Area Director of the Portland Area Office of the Bureau of Indian Affairs, he advised the Superintendent of the Western Washington Agency that all roads presently carried on the Indian Bureau road system are prima facie roads which "shall be open for free public use" under 25 C.F.R. § 162.6. He was further advised that accordingly all such roads would appear to fall within the provisions of RCW 46.04.430 which defines public highways as including:

> "* * * every way, lane, road, street, boulevard, and every way or place in the state open as a matter of right to public vehicular travel both inside and outside the limits of cities and towns."

Thus, roads which are open for free public use on the Makah Reservation under 25 C.F.R. § 162.6 would qualify as public highways under the laws of the state of Washington.

Under 25 C.F.R. § 162.6[8] the roads on the Makah Indian Reservation which are a part of the Bureau of Indian Affairs road system are open for free public use and can only be closed by the Secretary of the Interior when required for public safety, fire-prevention or suppression, or fish or game protection, or to prevent damage to unstable roadbeds. Accordingly, it is clear that the Makah Indian Tribe itself does not possess the authority to close the public roads on this reservation to the general public. Thus, the argument of the Makah Indian Tribe that the exercise of state jurisdiction upon public highways

[8]Appellant's Appendix D-13.

on the reservation constitutes a taking of private Indian trust land for a public purpose without compensation to the Indian land owner is without merit.

The appellant contends that the state has jurisdiction over the operation of motor vehicles on the Makah Indian Reservation and that this would result in a grant to the general public of a vested right of entry into the Makah Indian Reservation. The 1855 Treaty between the United States and the Makah Indian Tribe specifically provides:

> "* * * nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; * * *"

Thus, the treaty requires the permission of the tribe and the Indian agent to enable any white man to reside upon the reservation. This is an entirely different matter than the right of the public to use the public highways constructed by the Bureau of Indian Affairs with federal funds. The State of Washington has not alleged that the existence of state jurisdiction over the operation of motor vehicles upon public highways grants the state the right to permit any individual or group of individuals to reside upon the reservation without permission of the Indian tribe or to control the entry of persons onto the reservation.

It should be pointed out in addition that the roads which have been constructed on the reservation at the request of the Makah Indian Tribe are of great benefit to the tribe in that they enable the general

public to have access to the reservation to engage in the pursuit of sports fishing which is carried on by members of the tribe who own and operate the charter fishing boats. This industry constitutes a substantial source of revenue to many members of the Indian tribe.

The argument of the appellant that the enactment of chapter 37.12 RCW is invalid because it interferes with the plenary federal authority over the Makah Indian Tribe is clearly without merit. The Congress of the United States by the enactment of Public Law 83-280 authorized the several states, including Washington, to assume jurisdiction over Indian tribes and reservations in the manner in which they see fit, and the Washington State Supreme Court in the case of *State v. Paul, supra*, upheld the validity of the legislative enactment assuming jurisdiction and ruled that Article 26 of the Constitution of the State of Washington did not have to be amended prior to the time such jurisdiction was assumed. In addition, the United States Court of Appeals for the Ninth Circuit has ruled that the state of Washington complied with the federal requirements in assuming such jurisdiction. However, the appellee has not contended that the state of Washington has authority under the 1963 act to interfere with the plenary federal authority over the Makah Indian Tribe. There has been no interference on the part of the state through its officials with the affairs of the tribe as managed by the tribal council or with the use of the land on the

reservation which belongs to the tribe and individual allottees.

CONCLUSION

The Supreme Court of the State of Washington has properly determined that the state had authority to assume jurisdiction over Indian tribes and reservations by legislative enactment and without the necessity of a constitutional amendment, and further, that the state can exercise jurisdiction over all roads on Indian reservations which come within the definition of public streets, roads, alleys and highways.

The decision of the Washington State Supreme Court from which this appeal is taken should be affirmed by the court, or in the alternative, briefs should be submitted on the merits and oral argument allowed.

Respectfully submitted,

SLADE GORTON,
Attorney General for the State of Washington,
JANE DOWDLE SMITH,
Assistant Attorney General,
STEPHEN C. WAY,
Assistant Attorney General,
Attorneys for Appellee.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE QUINAULT TRIBE OF INDIANS of the Quinault Reservation in the State of Washington, on its own behalf and on behalf of its members; and JAMES JACKSON, ALICE CHENOIS, PHILIP MARTIN, JOHN SHALE, W. D. PETIT, BENNIE CHARLEY, FRANK CAPOEMAN and JESSIE CURLEY, on their own behalves and on behalf of the members of the Quinault Tribe,

Appellants,

No. 19,868

vs.

A. M. GALLAGHER, individually and as Sheriff of Grays Harbor County in the State of Washington, JOHN J. O'CONNELL, individually and as Attorney General of the State of Washington; ALBERT D. ROSELLINI, individually and as Governor of the State of Washington,

Appellees.

[November 10, 1966]
On Petition for Rehearing

Before: BARNES and HAMLEY, Circuit Judges, and MATHES, District Judge

HAMLEY, Circuit Judge:

In their complaint herein, plaintiffs asserted jurisdiction under 28 U.S.C. § 1343(3) (1964) and

Rev. Stat. § 1979 (1875) 42 U.S.C. § 1983 (1964) (Civil Rights Act), and under 28 U.S.C. § 1331 (1964) (federal question). The district court held that it did not have jurisdiction under these statutes and alternatively held that, if it did have jurisdiction, the action must nevertheless be dismissed because the complaint fails to state a claim on which relief can be granted. On appeal both of these alternative rulings were questioned, and written and oral argument was had thereon.

In our opinion, filed herein on September 19, 1966, we held that the district court correctly determined that it did not have jurisdiction under the statutes referred to above. We therefore affirmed without reaching the alternative ground for dismissing the action.

In a petition for rehearing, filed herein on October 19, 1966, plaintiffs call our attention to the fact that, on October 10, 1966, a new jurisdictional statute was enacted especially applicable to Indian tribes. This statute is Public Law 89-635, 80 Stat. 880 (1966), codified as 28 U.S.C. § 1362, the pertinent part of which reads as follows:

> "§ 1362. Indian tribes
>
> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

In their petition for rehearing, plaintiffs assert that the Quinault Tribe of Indians has, as required by section 1362, a governing body duly recognized by the Secretary of the Interior. They also argue that the new jurisdictional statute is applicable to cases, such as this, which are pending on appeal when the statute was enacted. Plaintiffs therefore ask us to hold that the district court had jurisdiction under the new statute, and to proceed to a determination of the alternative ground for dismissal—failure of the complaint to state a claim.

Defendants have filed a statement concurring in plaintiffs' request. As previously noted, the alternative ground has been fully argued in this court and neither plaintiffs nor defendants request further argument thereon.

We agree that the Quinault Tribe of Indians is an Indian tribe of the kind described in 28 U.S.C. § 1362, and that this newly-enacted statute is applicable to cases, such as this, which are pending on appeal when the statute was enacted. Section 1362 provides a basis for jurisdiction only where the matter in controversy arises under the Constitution, laws, or treaties of the United States. In this respect the new statute is identical with the general federal question statute, 28 U.S.C. § 1331. In our opinion of September 19, 1966, we held that the complaint raises three substantial federal questions. This ruling is equally applicable to section 1362.

We therefore conclude that insofar as plaintiff Indian tribe is concerned, the district court has jurisdiction under section 1362, and that dismissal of the action as to that plaintiff may not be affirmed on on jurisdictional grounds. To this extent, our opinion of September 19, 1966, is modified. As to the eight personal plaintiffs, however, the new jurisdictional statute has no application, and our earlier opinion therefore correctly disposed of the appeal insofar as they are concerned.

With regard to the Quinault Tribe of Indians we therefore turn to a consideration of the alternative ground for dismissal of the action relied upon by the district court—failure of the complaint to state a claim upon which relief can be granted.

In their complaint, plaintiffs attempt to state three claims. One of these is that, by reason of Public Law 280, described in our earlier opinion, Washington is precluded from asserting jurisdiction within Indian reservations until it first amends Article 26 of the state constitution.

Article 26 incorporates an "ordinance" prescribed by the enabling act which includes the provision that Indian lands "* * * shall remain under the absolute jurisdiction and control of the congress of the United States. * * *". Section 6 of Public Law 280, under which Washington purported to act in asserting jurisdiction within Indian reservations, provides in part, that the provisions of that act shall not become effective with respect

to such assumption of jurisdiction by any state "* * * until the people thereof have appropriately amended their State constitution or statutes as the case may be."

It follows, appellant argues, that since Washington's disclaimer of jurisdiction is imbedded in Article 26 of the state constitution, the method prescribed by section 6 of Public Law 280 for removing that disclaimer is to amend the constitution. Appellants point to legislative history indicating that, at the time Public Law 280 was under consideration, Congress was of the view that Washington would require an amendment of the state constitution. See 1953 U.S. Code Cong. and Admin. News, 2412-2414; 99 Cong. Rec. 10782, August 1, 1953.

Inasmuch as the Washington state disclaimer of jurisdiction was set forth as Article 26 of the state constitution, it is understandable that congressional spokesmen assumed that such disclaimer could be removed only by a constitutional amendment. But the underlying concern of Congress, we think, was not that a state disclaimer be removed in any particular way, but that it be removed in some way which would be valid and binding under state law, before federal jurisdiction be relinquished. Accordingly, we do not construe this legislative history as reading into Public Law 280 a requirement that Washington can remove its disclaimer only by a state constitutional amendment.

Article 26 of the state constitution, incorporating the ordinance referred to above, constitutes a compact with the United States, and is so designated. The introductory clause of that article reads as follows:

> "The following ordinance shall be irrevocable without the consent of the United States and the *people of this state:* * * *"
> (Emphasis supplied.)

In *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33, the Supreme Court of Washington upheld the validity of chapter 240, Laws of 1957, providing that Washington would extend its criminal and civil jurisdiction to Indians and Indian lands. In so doing, the court ruled that this legislative enactment represented the consent of the "people of this state," as those words are used in Article 26 of the state constitution. This ruling would be equally applicable to chapter 36, Laws of 1963, amending chapter 240, Laws of 1957. The federal courts are bound by this pronouncement as to state law.

In our opinion, these state legislative enactments, upheld as to validity by the state supreme court, are in full compliance with the federal requirements. It follows that, as to this matter, plaintiffs have failed to state a claim upon which relief can be granted.

A second claim which plaintiffs purported to state in their complaint is that the enabling act required Washington to amend its constitution before assuming jurisdiction over appellees. The enabling